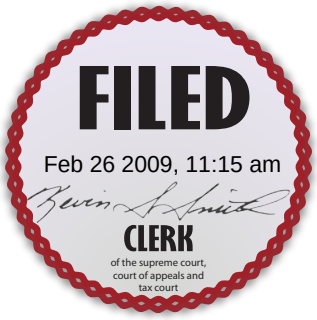


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| ROBERT GROFT, | ) | |
| Appellant-Defendant, | ) | |
| vs. | ) | No. 49A04-0802-CR-108 |
| STATE OF INDIANA, | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0703-FA-40597

**February 26, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

Robert Groft appeals his convictions and sentence for two counts of Child Molesting, as Class A felonies, following a jury trial. On appeal we address the following issues:

1. Whether the evidence is sufficient to support his convictions.

2. Whether Groft's convictions for two counts of child molesting, as Class A felonies, violate the Double Jeopardy provisions of the Indiana Constitution.

3. Whether the imposition of consecutive sentences totaling forty years is inappropriate under Indiana Appellate Rule 7(B).

We affirm in part, reverse in part, and remand.

## FACTS AND PROCECURAL HISTORY

In March 2007, Georgia Cross and her daughter, eight-year-old A.K., lived on Holt Road in Marion County. Tabitha Smith lived two doors down with her children, an eight-year-old daughter A.S. and a six-year-old son B.S. A.K. occasionally played with A.S. and B.S.

On March 10, 2007, Smith left her house for an appointment, and her children were staying with relatives. Groft, Smith's boyfriend, was at the house alone, but Smith saw A.K. alone in Smith's back yard as she left for the appointment. At the back door, A.K. asked Groft whether A.S. and B.S. were home. Groft told A.K. that Smith's children would return "in a little while." Transcript at 26. A.K. accepted Groft's invitation into the house and proceeded to the living room, where Groft joined her. Groft asked A.K. if she wanted to watch the movie "King Kong," and A.K. agreed.

Groft and A.K. sat on the couch and watched the movie for "about two hours." Id. at 28. Groft then left the living room for a short time. When he returned, he sat down on the couch and pulled A.K. onto his lap. At the time, A.K. was wearing a tank top, a skort (a skirt with shorts sewn into it), and underpants. Groft pulled A.K.'s skort and underpants to the left and put his finger inside her vagina. A.K. told him to stop, and excused herself to go to the restroom. When she returned from the restroom, she sat back on the couch in the living room. Groft then went to the restroom, at which time A.K. took a blanket off the couch and spread it over her.

When Groft returned from the restroom, he put his head under the blanket covering A.K. He pulled A.K.'s skort and underpants to the side and put his tongue inside her vagina. A.K. felt his mustache and the "wetness." Id. at 34. A.K. told Groft to stop and said she had to go home. Groft answered by asking her to play softball for a minute. A.K. agreed to play for a minute, but when Groft left for the restroom again, A.K. "dropped the bat and . . . ran home." Id. Once home, A.K. reported the incident to her mother, who called the police. Medical personnel at Riley Hospital examined A.K. and her underpants. Tests of A.K.'s underpants revealed the presence of amylase at a level that "indicate[d] saliva on the inside crotch panel of the underpants." Id. at 122.

The State charged Groft with two counts of child molesting, as Class A felonies. The jury trial began on January 14, 2008, and the jury returned guilty verdicts the following day. The trial court sentenced Groft to thirty years with ten years suspended and five years of sex offender probation on each count, to be served consecutively. Groft now appeals.

## DISCUSSION AND DECISION

### Issue One: Sufficiency of Evidence

Groft contends that the evidence is insufficient to support his convictions for child molesting, as Class A felonies. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Groft first contends that "defense counsel established during trial that [A.K.] had not been truthful about other aspects of her alleged encounter with Groft." Appellant's Brief at 8. To the extent Groft is challenging A.K.'s credibility, we cannot reweigh that evidence. See id. Thus, that argument is without merit.

Groft also contends that the evidence does not support his child molesting convictions because the DNA evidence found in A.K.'s underpants, "either by itself or in combination with [A.K.'s] testimony, does not establish beyond a reasonable doubt that on March 10, 2007, Groft performed any sexual deviate conduct on [A.K.]" Appellant's Brief at 9. Specifically, he argues that the State did not prove that the DNA evidence on the underpants was from saliva, how that DNA came to be there, or how long the DNA had been there. But Groft does not support his three alternative arguments with cogent reasoning. Thus, he has waived the argument for review. See Ind. Appellate Rule

46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning."). Waiver notwithstanding, we briefly address Groft's contention.

The State charged Groft with two counts of child molesting. To prove child molesting, as a Class A felony, in Count I, the State was required to show that Groft "perform[ed] or submit[ted] to sexual deviate conduct, an act involving the sex organ of A.K. and the mouth of [Groft]" when A.K. was eight years old.[1] See Ind. Code § 35-42-4-3(a) (LEXIS through 2006 Reg. Sess.). In Count II, the State was required to show that Groft "perform[ed] or submit[ted] to deviate sexual conduct, an act involving the sex organ of A.K. and the hand and/or finger of [Groft]" when A.K. was eight years old. See id.

The evidence showed that A.K.'s underpants contained a high level of amylase, an enzyme that contains DNA and is found in several different bodily fluids. A forensic serologist testified that the detection of amylase "high enough in comparison to the known saliva standard" indicates the presence of saliva. Transcript at 121. The serologist then testified that the "amylase activity was detected at a level that indicates saliva on the inside crotch panel of the underpants." Transcript at 122. Such evidence, when considered with A.K.'s testimony that Groft touched her vagina with his tongue, supports Groft's conviction for child molesting charged in Count I. To the extent Groft is arguing that the DNA could have come from urine on his finger, again, that evidence in

[1] While A.K.'s age is an element of the offense, that element is not at issue in this appeal.

combination with A.K.'s testimony is sufficient to support Groft's conviction for child molesting as alleged in Count II.

Groft argues that, because there is no test to determine whether DNA in the form of amylase has come from saliva, the fact-finder could not have determined beyond a reasonable doubt that Groft performed any deviate sexual conduct with A.K. on March 10, 2007. In essence Groft again asks that we reweigh the evidence, which we cannot do. See Jones, 783 N.E.2d at 1139. Groft's contention that the evidence does not support his convictions must fail.

**Issue Two: Double Jeopardy**

Groft next contends that his convictions for two counts of child molesting, as Class A felonies, violate the Double Jeopardy provisions of the Indiana Constitution.[2] Article I, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Two offenses are the "same offense" in violation of the Indiana Double Jeopardy Clause if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Rutherford v. State, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007). Under the "actual evidence" test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Id.

To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the

[2] Groft presents this argument as a challenge to the imposition of consecutive sentences. We must first determine whether a double jeopardy violation exists before we can consider its effect on sentencing.

evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish all of the essential elements of a second challenged offense. Id. "[T]he 'proper inquiry' is not whether there is a reasonable probability that, in convicting the defendant of both charges, the [fact-finder] used different facts, but whether it is reasonably possible it used the same facts." Bradley v. State, 867 N.E.2d 1282, 1284 (Ind. 2007) (emphasis original).

> Application of [the actual evidence] test requires the court to "identify the essential elements of each of the challenged crimes and to evaluate the evidence from the jury's perspective . . . ." In determining the facts used by the fact-finder to establish the elements of each offense, it is appropriate to consider the charging information, jury instructions, and arguments of counsel.

Lee v. State, No. 27S04-0805-PC-226, 2008 Ind. LEXIS 772, at *5 (September 3, 2008) (alternations original, internal citations omitted).

Here, Groft contends that

> a reasonable possibility exists that the amylase found in [A.K.'s] underwear was used to support both of Groft's Child Molest convictions. According to testimony at trial, amylase is not just found in saliva. It is also found in urine and various other body [sic] fluids. During [A.K.'s] visit, Groft used the restroom several times. While using the restroom, it is possible that Groft got urine on his hands. Therefore, a reasonable possibility exists that the jury used the amylase facts to convict Groft of both counts.

Appellant's Brief at 15. We must consider the evidence as well as the charging information, jury instructions, and arguments of counsel in order to determine whether Groft's convictions for two counts of child molesting violates double jeopardy principles.

To prove beyond a reasonable doubt that Groft committed the offense of child molesting, as a Class A felony, the State was required to show that Groft "perform[ed] or submit[ted] to sexual intercourse or deviate sexual conduct" with A.K. when Groft was at

least twenty-one years old. See Ind. Code § 35-42-4-3(a). Sexual deviate conduct is defined as an act involving the sex organ of one person and the mouth or anus of another person or, alternatively, the penetration of the sex organ or anus of a person by an object. Ind. Code § 35-41-1-9 (LEXIS through 2007 Reg. Sess.). Here, the information charged Groft with two counts of child molesting, as Class A felonies. The first count charged, in relevant part, that Groft "perform[ed] or submit[ted] to deviate sexual conduct, an act involving the sex organ of A.K. and the mouth of [Groft.]" Appellant's App. at 103. The second count charged, in relevant part, that Groft "perform[ed] or submit[ted] to deviate sexual conduct, an act involving the sex organ of A.K. and the hand and/or finger(s) of [Groft.]" Id. Each count alleges conduct not found in the other count, namely, which part of Groft touched A.K. The jury instructions mirror the language of the charging information. Thus, there is no double jeopardy violation based on the charging information or the jury instructions.

We also find no double jeopardy violation based on the closing statements of counsel.[3] In its closing statement, the State summarized the evidence, in relevant part, as follows:

> And at some point in time, Robert Groft left the room and came back. And when he came back, he pulled [A.K.] onto [his] lap, reached underneath that blanket, and pushed aside her shorts part of her skort, her panties, and stuck his finger inside her vagina. And you heard her testify, and saw her demeanor when she testified. She said that did not feel good on her body, that it hurt. And so she told him to stop, and she went into the bathroom.
>
> And when she came out of the bathroom, [Groft] then went into the bathroom as well. And [A.K.] stayed in the house and laid [sic] back down

[3] The opening arguments of counsel were not transcribed. Although the parties could have reproduced those arguments pursuant to Indiana Appellate Rule 31, they have not done so. Thus, the opening arguments are not available for our review.

> on the couch, covering herself up with the blanket. And [Groft] came out of the bathroom.
>
> And he must have had time in there to think. He must have had time in there to look in the mirror and think to himself, "What have I just done? This girl is the same age as the girl that lives in this house."
>
> But he didn't have any of that reflection. He didn't have any of that thought as to what he had done was wrong, because what we know for sure that he did next was put his head underneath that blanket and move her skorts [sic] to the side, move her panties to the side yet again, and use his tongue on the inside of her vagina. . . .

Transcript at 206-07. The State clearly described two separate incidents, one involving Groft's hand in A.K.'s vagina and the other involving Groft's tongue in her vagina. There is no double jeopardy violation based on the closing statements.

Finally, we find no double jeopardy violation based on the evidence presented at trial. Groft argues that the amylase found in A.K.'s underpants could have been used to convict him on both counts of child molesting. But Groft ignores A.K.'s testimony. A.K. testified that Groft first inserted his finger into her vagina, went to the restroom after she told him to stop, and, upon returning from the restroom, put his head under her blanket, pushed aside her skorts and underpants, and inserted his tongue in her vagina. A.K. very clearly described two separate incidents. The jury could have convicted on A.K.'s testimony alone. See Garner v. State, 777 N.E.2d 721, 725 (Ind. 2002) ("A conviction for child molesting may rest exclusively upon the uncorroborated testimony of the victim.").

Considering the charging information, jury instructions, closing statements, and evidence, either individually or collectively, Groft has not demonstrated that his convictions for two counts of child molesting, as Class A felonies, violate double

jeopardy principles. As a result, he also has not shown that the double jeopardy provision in the Indiana Constitution prohibits his consecutive sentences for two counts of A felony child molesting.

**Issue Three: Sentencing**

Groft next challenges his sentence. Specifically, he argues that the imposition of consecutive sentences is inappropriate under Indiana Appellate Rule 7(B) and that his sentence is disproportionate to the offenses. Because we determine that Groft's sentence is inappropriate under Rule 7(B), we need not consider his contention that the imposition of consecutive sentences is constitutionally disproportionate to the offenses.

Groft contends that the imposition of consecutive sentences is inappropriate in light of the nature of the offenses and his character. We exercise with great restraint our responsibility to review and revise sentences, recognizing the special expertise of the trial bench in making sentencing decisions. Bennett v. State, 787 N.E.2d 938, 949 (Ind. Ct. App. 2003), trans. denied. If the sentence imposed is authorized by statute, we will not revise or set aside the sentence unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B).

The advisory sentence for a Class A felony is thirty years. Ind. Code § 35-50-2-4. At sentencing, the trial court imposed Groft's sentence as follows:

> In considering aggravating and mitigating circumstances, the Court has considered what's been argued today. As far as the defendant's prior legal history, what I will say is, I agree with your attorney, Mr. Groft, that sure, your criminal history, in comparison to your Class A felony convictions that you're being sentenced on today—your criminal history is—is certainly not as serious prior to those convictions being entered against you.

It's not like you have a criminal history that is littered with many offenses against people that required you to have direct content or violent contact with other individuals. However, that doesn't justify me ignoring the criminal history that you have, which began at quite an early age, age sixteen, in Hendricks County. In order to do a burglary, you have to go into the residence of another person.

That was followed by some minor driving offenses in '98: driving while suspended, not having a valid license. But then you're back again in '94 with charges that resulted in a conviction for battery with bodily injury. That, of course, had to involve another individual. You could've burglarized a residence without coming in contact with the actual owners of that residence, but you can't commit a battery that causes bodily injury without having contact with another person.

That's followed by a theft conviction in '03. Another theft conviction in '05. A conversion in '05. And a trespass in '07.

So it appears you like to take people's property, or go places where you're not welcome, both through the trespass and the burglary convictions. But you've never, clearly, done anything as serious as what you're about to be sentenced for.

Your statement was telling to the Court. And I picked up on the same fact that the State has just argued, that your—your explanation for your behavior, not on this particular day, but for your lifestyle in general, is, I'm a drug addict, and have been that way since a very young age. And that's what your life has consisted of. And you admitted that you betrayed people to support your drug habit and that you were a thief.

So I think all of those things that you have said kind of—I can see in between the lines of your criminal history. I do find your criminal history to be an aggravating circumstance, but I recognize the argument your attorney has made, and I do not find it to be significantly aggravating.

I find it should be given medium weight, because as I review not just the criminal history, but I review the opportunities you've had to change your behavior, you were given opportunities on probation more than once. You were ordered into substance abuse treatment before. You failed at your probations.

You are admittedly a man who knows, and has known, he's had a substance abuse treatment. In fact, that has been ordered as conditions of probation

> more than once. So you were given opportunities to change your life before you ended up on Marion County Jail on these child molest charges.
>
> I think it's wonderful, if what you say is true, that since you've been there, you've found a new life and will lead a new lifestyle. Unfortunately, you're going to be leading that new lifestyle in the Department of Correction[] because of what you've done.
>
> I do not agree that the offenses that were committed on [A.K.] were offenses that were all part of one episode of conduct. In fact, I recall her testimony specifically that there was one molest that occurred, that the defendant went to the restroom, and that when he came back, another molest occurred. In that sense, he shouldn't be rewarded by having concurrent sentences.
>
> I do not find mitigating circumstances, based upon my review of the PSI or based upon what I've heard today. So I just have the one aggravating circumstance of his prior criminal history, his failure to take advantage of his opportunities that the court system has given him.
>
> And I am imposing the following sentences on each count, which will be run consecutive. One Count I: thirty years, ten years suspended, twenty years executed. Count II: thirty years, ten years suspended, twenty years executed, with five years of sex offender probation.

Transcript at 260-64.

We first consider whether Groft's forty-year sentence executed is inappropriate in light of the nature of the offenses. Child molesting, under any circumstances, is a heinous crime that has permanent repercussions for its victims, children who are not equipped to defend themselves. Even more egregious are cases of repeated molestation, multiple victims, or where the defendant was in a position of trust. Here, the offenses appear to be crimes of opportunity. A.K. was unsupervised and went to the Smith house of her own accord. Groft was at Smith's home when A.K. stopped by, asking whether Smith's children could play. The Smith children were not home, but Groft invited A.K. inside to watch a movie, where he digitally molested her. He and A.K. then went to the

restroom in turns, which gave him time to consider his actions. But, upon returning, Groft molested A.K. again.

Our supreme court's opinion in Walker v. State, 747 N.E.2d 536 (Ind. 2001), is instructive. There, the defendant was convicted of two counts of A felony child molesting of a six-year-old boy for whom he babysat over the course of two months. The trial court sentenced Walker to two forty-year terms, with five years suspended from each, to run consecutively. On appeal, the supreme court found that sentence to be manifestly unreasonable under former Indiana Appellate Rule 17(B). Id. at 538. The court observed that crimes against children are contemptible, that Walker had fled the jurisdiction, and that the absence of physical injury did not bar an enhanced sentence. But the court further noted that Walker "was far from being the worst offense or the most culpable offender." Id. As a result, the court held that Walker's eighty-year aggregate sentence was manifestly unreasonable and, instead, revised his sentence to concurrent forty-year terms, with five years suspended, for a sentence of thirty-five years executed. Id.

Similarly, our supreme court revised sentences for child molesting in Harris v. State, 897 N.E.2d 927 (Ind. 2008), to be concurrent instead of consecutive. Harris was convicted of two counts of child molesting, as Class A felonies, after he had sexual intercourse with his live-in girlfriend's eleven-year-old daughter. Harris had acted as the child's father, and she had called him "Dad." Id. at 928. In a memorandum decision, another panel of this court affirmed Harris' sentence of fifty years on each count, to be served consecutively. Harris v. State, 881 N.E.2d 733 (Ind. Ct. App. 2008), rev'd 897

N.E.2d 927. But the supreme court held that the sentence was inappropriate.[4] 897 N.E.2d at 930. That court observed that Harris's convictions arose from identical offenses involving the same child. The court found Harris' position of trust with the victim to be an aggravating factor, but then noted that the molestations were "manifestly different in nature and gravity from [Harris'] previous convictions[.]"[5] Id. Overall, the court held that "the aggravating circumstances [were] sufficient to warrant imposing enhanced sentences" but that they were not ""sufficient to justify imposing consecutive sentences." Id. As a result, the court revised Harris' sentence to fifty years on each count, to be served concurrently.

Similarly, here, Groft was convicted of two counts of A felony child molesting involving a single victim. While morally reprehensible, Groft's offenses did not involve multiple victims, occur repeatedly or over a long period of time, and Groft was not in a position of trust with A.K.[6] Cf. Walker, 747 N.E.2d 536 (where offender was in position of trust and molestations occurred over period of two to three months). And Groft's criminal history includes two D felony theft convictions and four misdemeanor

[4] Because Harris committed the offenses before the enactment of the advisory sentencing scheme, the supreme court used the presumptive sentencing scheme as a baseline in determining the appropriateness of the sentence. Although the presumptive sentencing scheme does not apply in the case before us, we do not find this difference of great moment under the circumstances presented.

[5] Harris had two prior felony convictions: receiving stolen auto parts and theft, both as Class D felonies.

[6] The dissent correctly observes many similarities between the facts in Walker and those in the present case. But the dissent ignores a significant distinction between the cases: Walker perpetrated the molestations while in a position of trust, but Groft was not. Again, while any act of child molestation is reprehensible, such acts perpetrated while in a position of trust are even more egregious.

convictions.[7] That history unrelated in nature or gravity to the current offenses.[8] See Harris, 897 N.E.2d at 930. On the facts presented, we conclude that Groft's forty-year executed sentence is inappropriate in light of the nature of the offenses.

We next consider Groft's character. As discussed above, Groft had time to consider his actions between molestations, when A.K. and he, in turns, left the living room to use the restroom. Despite that opportunity for reflection, Groft molested A.K. once more after returning from the restroom. And, again, we note that his criminal history includes two felonies and four misdemeanors dating back to age sixteen. While none of Groft's convictions were for sexually related offenses, he is no stranger to the criminal justice system. Additionally, Groft has not taken advantage of leniency in the past, as evidenced by his failure to successfully complete probation and substance abuse treatment. While Groft's character may not in itself recommend him for revision of his sentence, when we consider his character as well as the nature of the offenses in this case, we nevertheless must conclude that Groft's sentence is inappropriate in light of the nature of the offenses and his character. Thus, in the interest of judicial economy, we exercise our authority to revise his sentence.

Groft has not appealed the imposition of thirty years on each count, with ten years suspended. Instead, he appealed his sentence to the extent the court ordered those

[7] The dissent stresses that Groft's criminal history includes a conviction for battery with bodily injury. But Groft was convicted of that offense, as a Class C misdemeanor, in 1994. His history since that time contains no offenses involving physical injury. Thus, we disagree that great weight should be accorded Groft's 1994 battery conviction.

[8] The Pre-Sentence Investigation Report notes that Groft was arrested for "Children Fondle" as a Class D felony in May 1992, but that charge was dismissed in October 1992. We express no opinion whether there was any foundation for that arrest or, if so, whether that additional offense would alter our conclusion here.

sentences to be served consecutively. In revising Groft's sentence, we again note his criminal history and his opportunity for reflection between the offenses. We also observe, as noted by the trial court, that Groft was given opportunities to rehabilitate but did not successfully complete probation or substance abuse treatment. In light of those facts and the circumstances, we revise Groft's sentence to thirty years on each count executed, to be served concurrently.

**Summary**

We conclude that the evidence is sufficient to support Groft's convictions for two counts of child molesting, as Class A felonies. A.K. testified that Groft digitally penetrated her vagina, went to the restroom, and then returned and orally penetrated her vagina. Moreover, forensic testing revealed the presence of Groft's DNA, likely from his saliva, on the inside panel of the crotch of A.K.'s underpants. We reject Groft's argument that the DNA could have come from his hands, given that he went to the restroom between offenses, and, therefore, that the State did not demonstrate that he committed "any deviate sexual conduct" on A.K. Appellant's Brief at 9.

Likewise, we reject Groft's argument that his convictions on two counts of child molesting violate Indiana's Double Jeopardy clause. After review of the charging information, the parties' closing statements, the evidence presented at trial, and the jury instructions, we conclude that there is not a reasonable possibility that the jury used the same evidence to convict on both counts. Especially telling in this regard is, again, A.K.'s testimony specifying the two different sexual acts that Groft performed.

Finally, we reverse Groft's sentence because we conclude that it is inappropriate in light of the nature of the offenses, despite his character. While the offenses are loathsome, they are "some distance from being the worst offense or the most culpable offender." Walker, 747 N.E.2d at 538. Thus, we exercise our authority to revise the sentences to thirty years on each count to be served concurrently. We remand and instruct the trial court, without a hearing, to issue an order and make any other docket entries necessary to sentence Groft accordingly.

Affirmed in part, reversed in part, and remanded.

ROBB, J., concurs.

MAY, J., dissents with separate opinion.

# IN THE
# COURT OF APPEALS OF INDIANA

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| ROBERT GROFT, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A04-0802-CR-108 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |
| | ) | |

**MAY, Judge, dissenting**

I agree with the majority that Groft was not subjected to double jeopardy and there was ample evidence to support his convictions. However, in light of Groft's character and criminal history I cannot find inappropriate the imposition of the advisory sentence for each conviction, even when ordered served consecutively.

In analyzing the appropriateness of Groft's sentence, the majority finds "instructive" *Walker v. State*, 747 N.E.2d 536 (Ind. 2001) (Slip op. at 13). So do I. But I believe *Walker* instructs us we must *affirm* Groft's sentence, and I therefore respectfully dissent from the majority's determination Groft's consecutive advisory sentences are inappropriate.

We exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires us to give that decision "due consideration" and because we understand and

recognize the unique perspective a trial court brings to its sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). A defendant bears the burden of persuading us his or her sentence is inappropriate. *Id*.

Groft's crimes and the sentencing considerations his trial court noted were quite similar to Walker's. Yet Groft's sentence, which the majority finds inappropriate, is essentially the same as the revised sentence our Supreme Court determined was reasonable[9] in *Walker*.

Both Walker and Groft were convicted of two counts of Class A felony child molestation. Walker performed oral sex on a six-year-old boy. Groft performed oral sex on an eight-year-old girl and penetrated her vagina with his finger. Walker committed the crimes while on probation and fled the jurisdiction, but his sentencing court found no history of criminal behavior.[10] Groft, by contrast, has a lengthy criminal history, and his sentencing court noted probation violations and substance abuse problems. In both cases, the two separate charged acts of child molestation were similar and involved the same child. In *Walker* there was no physical injury, and the State alleges none in the case before us. Walker was in a position of trust with his victim, but the court made no such

[9] I do not suggest our standard for review of Groft's sentence is the same standard our Supreme Court applied in *Walker*. It is not. However, I believe Groft's sentence must be affirmed under the applicable "inappropriateness" standard.

Before January 1, 2003, an appellate court needed to find a sentence "manifestly unreasonable" before it could revise it. This barrier was so high that it ran the risk of impinging on another constitutional right, that a defendant would have in all cases an absolute right to one appeal. *Reed v. State*, 856 N.E.2d 1189, 1198 n.6 (Ind. 2006). As a result, our rules were amended to authorize us to revise a sentence if it is "inappropriate in light of the nature of the offense and the character of the offender." *Id*. This formulation places the central focus on the role of the trial judge, while at the same time reserving for appellate courts the chance to review sentencing decisions in a climate more distant from "local clamor." *Id*.

[10] I acknowledge the *Walker* sentencing court's finding that Walker committed his crimes while on probation seems inconsistent with its statement Walker had no criminal history.

finding as to Groft.

The *Walker* court acknowledged the aggravating circumstances warranted an enhanced sentence, but found Walker's "aggregate sentence of eighty years" manifestly unreasonable. *Id*. at 538. The Court revised Walker's sentences to run concurrently, leaving him with forty-year sentences on each count with five years suspended. Groft's sentence that the majority now finds "inappropriate" is, in practical effect, very much like Walker's sentence after our Supreme Court revised it so it would no longer be "manifestly unreasonable." See slip op. at 12 ("We first consider whether Groft's *forty-year sentence executed* is inappropriate . . . .") (emphasis supplied).

Walker and Groft committed similar acts and were convicted of the same offenses. Groft's aggravating circumstances are at least as serious as Walker's. Unlike Walker, Groft has a substantial criminal history beginning when he was sixteen years old and a history of substance abuse. Groft's criminal history includes three felony and five misdemeanor convictions, one of which was a conviction of battery with bodily injury. The court characterized Groft's explanation for his offense as "I'm a drug addict, and have been that way since a very young age." (Slip op. at 11.) Walker's sentencing court did not find a criminal history nor did our Supreme Court note any history of drug abuse. The *Walker* precedent and our deferential standard of sentencing review do not permit us to revise Groft's sentence as the majority has.

Nor does *Harris* permit us to find Groft's sentence inappropriate. After our Supreme Court revised his sentences to run concurrently rather than consecutively, Harris was left with a presumably "appropriate" fifty-year executed sentence. 897 N.E.2d at

930. This is, in practical effect, ten years longer than the sentence the majority finds inappropriate in the case before us. The majority correctly notes similarities between Harris' aggravating circumstances and Groft's, and correctly observes that Harris was in a position of trust with his eleven-year-old victim. Accordingly, our Supreme Court's revision of Harris' sentence to the "appropriate" fifty years supports my belief Groft's forty-year executed sentence is likewise appropriate.

I would affirm Groft's sentence and therefore must respectfully dissent.